

August 25, 2014

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)	
)	
Applications of Comcast Co. and)	MB Docket No. 14-57
Time Warner Cable, Inc. For Consent)	
to Assign or Transfer Control of)	
Licenses and Authorizations)	

Comments of Digital Liberty

I would like to thank the Federal Communications Commission for the opportunity to provide comments regarding the proposed merger between Comcast and TWC Cable systems (TWC).

I. Introduction

These comments express the opinion that the FCC should not stall the Comcast-TWC merger with voluntary conditions, which address policy prerogatives, rather than actual anti-competitive harms.

Comcast and TWC have already conceded to a number of conditions imposed by the FCC on previous mergers and the conditions from the Comcast-NBC Universal merger will extend to TWC subscribers in Comcast's new service areas. As such, I do not believe there is significant evidence that the FCC should impose additional public interest conditions in their merger review.

II. Competition

A merger between Comcast and TWC systems does not any present horizontal or vertical anti-trust issues.

Horizontal Anti-trust

- A merger between Comcast and TWC does not raise any horizontal anti-trust issues. The companies do not compete against each other in any relevant market for MVPD, broadband and voice services. Therefore, the merger will not lead to any loss in competition.

Vertical Anti-trust in Video

- Comcast has already agreed not breach the 30% threshold on market share; a merger is deemed by the FCC to be anticompetitive if the merged entity's MVPD market share would go above about 30%. The 30% cap was set on the assumption that a merged entity with market share above 30% is able to exert buying power (or monopoly power) on programmers. Comcast is complying with this 30% cap even though the courts invalidated it twice, and the threshold was set at a time when the influx of competition from satellite and Internet video was far less.

In the Comcast-NBC Universal merger, the FCC cited increased ability to foreclose rival programming networks; the focus then was on content. There is no vertical integration issue in this case; therefore, much of the reasoning behind the Comcast-NBC Universal merger does not apply to the Comcast-TWC merger.

This information clearly demonstrates that the FCC should not have any vertical anti-trust concerns in MVPD markets regarding the Comcast-TWC merger.

Vertical Anti-trust in Broadband

Some have claimed that the increase in Comcast's share of broadband Internet subscribers at a national level after the merger will further decrease competition in broadband Internet access, and enable Comcast to increase its bargaining power against others in the Internet ecosystem, especially edge providers. They also claim that this will stifle innovation.

At the outset, it is important to point out that Comcast having a larger share of broadband Internet subscribers at a national level after the merger will not in any way reduce competition and choice in broadband Internet access markets.

That is because the relevant market for broadband Internet access is not at a national level, but rather at a local level from providers who offer service in their local markets.

This is why a TWC customer in New York City is unable to purchase broadband from Comcast, and a Comcast customer in Philadelphia is unable to purchase broadband from TWC.

After this merger, that customer in New York City will still have the same number of providers, but Comcast will merely take the place of TWC. Therefore, the claims that this merger will have an impact of broadband

Internet access competition are wrong, and should have nothing to do with the FCC's review of this merger.

This means the merger will not change the bargaining power between Comcast and others in the Internet ecosystem, whether it is in relation to Internet interconnection or some other business arrangement. In any case, there is sufficient evidence to show that Internet interconnection is highly competitive and that parties negotiating with Comcast have sufficient and increasing bargaining power to make deals with Comcast on a level playing field.

Given there will be no reduction in competition in any relevant market for broadband access services as noted earlier, the appropriateness of the current level of competition in broadband access is irrelevant to this merger review. That said, the claims by some that broadband access competition is inadequate are not based on market realities. For example there are marked inconsistencies with the FCC definition of competition.

We believe that regardless of platform, **all broadband connections, whether wired or wireless, compete with each other**. Further there are other competitors in the wireline market besides cable. The one we shall note below is DSL.

The Internet Access Services report from the FCC's Wireline Competition Bureau, demonstrates that customers are demanding higher speed services and that providers are meeting this demand; this is not indicative of an uncompetitive market:

The reported data show a 30% annual increase in the number of residential fixed- location connections that are at least 6 Mbps downstream and 1.5 Mbps up stream, (from 34.5 million in June 2012 to 45 million in June 2013) and a 31% annual increase in the number of connections that are at least 10 Mbps downstream and 1.5 Mbps up stream (from 34.1 million in June 2012 to 44.8 million in June 2013).¹

This data clearly shows that the market is already responding to increased consumer demand for speed and capacity. **Also, the report, in footnote 14, states, "these increases are largely due to a change in upstream-speed reporting by a single aDSL services provider."**² In this one sentence, the FCC acknowledges that DSL is competitive with cable in the fixed-wireline arena. Furthermore, Chart 1 below demonstrates significant subscriber churn between AT&T and Comcast, indicating vibrant competition.

¹ Industry Analysis and Technology Division, Wireline Competition Bureau, Internet Access Services: Status as of June 30, 2013 (June 2014). Via: www.fcc.gov/web/stats.

² Id

Chart 1: AT&T Comcast broadband Subscriber Churn, Jan. 2014 – March 2014



From Nasdaq.com via seekingalpha.com³

III. FCC use of Merger Conditions

FCC Commissioners have expressed concerns regarding the FCC's expanded use of the public interest test to extract conditions:

- FCC Commissioner Harold Furchgott-Roth said the voluntary conditions submitted by SBC in the merger review process of SBC-Ameritech could only be called voluntary by “those willing to contort the English language.”^{4 5}
- Also in reference to the SBC/Ameritech merger, FCC Commissioner, Michael Powell said, that he did not agree with “the idea that a regulated entity can ‘voluntarily’ offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship.”⁶

³ Dion, Don. AT&T Gets Very Direct, Seeking Alpha, May 5, 2014. Via www.seekingalpha.com

⁴ Furchgot-Roth, Harold. Press Statement of Commissioner Harold Furchtgott-Roth RE SBC-Ameritech Transfer Proceeding. Oct. 1999. via: http://transition.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr948.html

⁵ May, Randolph J. Any Volunteers: The FCC unfairly regulates ‘by condition’ when it extracts concessions from merging telecom companies. Legal Times, March 6, 2000. Via: <http://www.pff.org/issues-pubs/other/opinion/000306LegalTimes.html>

⁶ Powell, Michael. Press Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part. Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310(d) of the Communications

- Unfortunately, the trend in FCC merger reviews continues to be “excessively coercive and lengthy,” according to FCC Commissioners Rob M. McDowell and Meredith Attwell Baker.⁷ They reiterated that

Any proposed remedies should be narrow and transaction specific, tailored to address particular anticompetitive harms. License transfer approvals should not serve as vehicles to extract from petitioners far-reaching and non-merger specific policy concessions that are best left to broader rulemaking or legislative processes.⁸

The FCC’s track record of voluntary merger conditions have become more intrusive over time and are likely to affect other aspects of the industry rather than apply only to the merger at hand.

Previous conditions⁹ include: divestiture of certain assets,¹⁰ the creation of new programming and a la carte options,¹¹ temporary price freezes,¹² increased reporting requirements,¹³ unbundling of services,¹⁴ adherence to open Internet rules.¹⁵

These clearly move away from mitigating anti-competitive harms that are a direct result of a transaction and steps into prescribing business models.

Boundaries of the Public Interest Test

Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules (CC Docket No. 98-141) Oct. 6, 1999. Via: <http://transition.fcc.gov/Speeches/Powell/Statements/stmkp929.txt>

⁷ Id

⁸ Joint Concurring Statement of Commissioners Robert M. McDowell and Meredith Attwell Baker. FCC 11-4

⁹ Ruane, Kathleen A. CRS Report for Congress: Merger Review Authority of the Federal Communications Commission. August 20, 2008.

¹⁰ See e.g., *In re News Corp. & DIRECTV Group, Inc.*, 23 FCC Rcd 3265, 3294 at ¶ 63 (2008)(ordering the severance of attributable interests in certain assets)

¹¹ *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 111-112.

¹² *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 105-110; *In the Matter of SBC Communications and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, Appendix F (2005).

¹³ *In the Matter of SBC Communications and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, Appendix F (2005).

¹⁴ Id

¹⁵ *In the Matter of Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Order, FCC 05-184, Appendix G (November 15, 2005).

The FCC has been granted the authority to impose conditions that remedy merger related harms.¹⁶ Although legal precedence may seem scarce in terms of how the public interest test should be applied to mergers, there is precedence on how the public interest test should be applied in respect to the authority granted to the FCC where the requisite test is assuring the public interest.

The general legal precedent requires that the FCC should not use the public interest evaluation to equalize competition.¹⁷ In other words, the public interest condition is not about competitors it is about competition.

The paper, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the Public Interest Standard* by Thomas M. Koutsky, Esq. and Lawrence J. Spiwak, Esq., cites much of the relevant case law in which precedent “dictates that the FCC’s ‘public interest authority is not unfettered.’”¹⁸ Case law provides insight into the limitations of the FCC. The following is a brief sample of the case history that Koutsky and Spiwak cite, setting the bounds of FCC authority.

In, the 1974 case *Hawaiian Tel. Co. v. FCC*, the D.C. Circuit found that it was “embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors.”¹⁹

In the 1981 D.C. Circuit case, *W. Union Tel. Co. v. FCC*, the court stated that “equalization of competition is not itself a sufficient basis for Commission action.”²⁰ Once again, citing *Hawaiian Telephone*, the 1995 D.C. Circuit confirmed that the public interest standard did not give the Commission autonomy to “subordinate the public interest to the interest of ‘equalizing competition among competitors’” in *SBC Communications Inc. v. FCC*.

Twice²¹ the D.C. Circuit Court has determined that the FCC “does not have the authority to use merger conditions to circumvent statutes the agency is charged with administering.”²²

The FCC should not pursue policy goals outside of its regulatory authority:

While the FCC is well within its authority to issue narrowly- tailored

¹⁶ 47 U.S.C. §303(r)

¹⁷ Spiwak, Larry. A Quick Primer on the FCC’s “Public Interest” Merger Authority. March 13, 2014.

¹⁸ Koutsky, Thomas M. & Lawrence J. Spiwak. *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the Public Interest Standard*. 18 CommLaw Conspectus. 329 (2010). Via: <http://commlaw.cua.edu/res/docs/05-Koutsky-Spiwak-Final.pdf>

¹⁹ *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974).

²⁰ *W. Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981)

²¹ see *SBC Commc’ns Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995). See also *Ass’n of Commc’ns Enters. v. FCC*, 235 F.3d 662, 663, 666–68 (D.C. Cir. 2001).

²² Koutsky, Thomas M. & Lawrence J. Spiwak. *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the Public Interest Standard*. 18 CommLaw Conspectus. 329 (2010). Via: <http://commlaw.cua.edu/res/docs/05-Koutsky-Spiwak-Final.pdf>.

conditions as appropriate to remedy a merger-related harm, viewing industry mergers as opportunities to promote or jump-start an affirmative public policy agenda via so-called “voluntary” merger commitments—particularly if policymakers are frustrated by an inability to achieve a political consensus on nationwide rules of general applicability—is a troubling extension of regulatory authority by the FCC.²³

Because the FCC seems to disregard these restraints to its authority, it seems that companies do their best to determine what the FCC might want as public interest conditions. Companies then implement these conditions in what I suspect is a way to speed the process and reduce what I consider FCC overreach.

IV. Heading off the FCC

In light of previously imposed merger conditions, Comcast and TWC have included many of these already “agreed to” conditions as part of their merger agreement before the FCC began the review process:

- As noted earlier, the FCC has previously imposed a 30% cap on the market share that might be held by any MVPD.²⁴ This cap has been twice vacated by the court of appeals;²⁵ however, it has still been included as part of merger conditions.²⁶ Comcast’s subscribership/coverage area is currently 28.6% and TWC’s is 19.6%.²⁷ As a condition of the merger Comcast and TWC will “swap” certain coverage areas to ensure there are no harms to competition. Additionally, upon approval of the merger, Comcast will divest 3.9 million customers to Charter Communications in order to stay under the FCC’s arbitrary 30% subscribership cap.
- Furthermore, the Conditions from Comcast’s previous merger with NBC Universal will extend to their new subscriber areas. This includes the no-blocking and non-discrimination “Open Internet Rules,” which were imposed on Comcast even after the DC Circuit vacated these rules.²⁸

²³ Koutsky, Thomas M. & Lawrence J. Spiwak. *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the Public Interest Standard*. 18 CommLaw Conspectus. 329 (2010). Via: <http://commlaw.cua.edu/res/docs/05-Koutsky-Spiwak-Final.pdf>.

²⁴ In the Matter of Applications of Comcast Corp. and TWC Cable Inc. for Consent to Transfer Control of Licenses and Authorizations. FCC MB Docket No. 14-57. April 2014

²⁵ See *TWC Entm’t Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001) (“TWC II”). *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009).

²⁶ In the Matter of Applications of Comcast Corp. and TWC Cable Inc. for Consent to Transfer Control of Licenses and Authorizations. FCC MB Docket No. 14-57. April 2014 p.143-144

²⁷ Id 107

²⁸ Id 110

- The merged Comcast NBC Universal, committed to expanding local programming,²⁹ educational programming,³⁰ programming for children,³¹ and maintaining diversity.³²
- Comcast's Internet Essentials program, which has connected 1.4 million low income Americans since 2011,³³ was born out of this merger as well.³⁴ Further in August 2014, Even though the requirement for expanding this program has expired, Comcast will continue to expand Internet Essentials, which has been extended to new Families who are approved for Internet Essentials between August 4th and September 20th, 2014 will receive up to six months of Internet service. This program will now reach former TWC customers in markets like New York and Los Angeles.³⁵

V. Conclusion

If the FCC does decide to impose conditions, it should ensure that they are tailored to actual anticompetitive harms rather than non-transaction-specific policy prerogatives.

Thank you again for your consideration of these comments.

Respectfully,

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President
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Katie McAuliffe
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Digital Liberty

²⁹ In the Matter of Applications of Comcast Corp. and TWC Cable Inc. for Consent to Transfer Control of Licenses and Authorizations. FCC MB Docket No. 14-57. April 2014 p.

³⁰ Id 110

³¹ Id

³² Id 110-120. Clyburn Statement

³³ In the Matter of Applications of Comcast Corp. and TWC Cable Inc. for Consent to Transfer Control of Licenses and Authorizations. FCC MB Docket No. 14-57 p.64-71

³⁴ Id

³⁵ Id